February 29, 2016

Gina McCarthy
Administrator
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Re: Failure of U.S. EPA to Respond to 2009 Petition for Corrective Action regarding Indiana NPDES program

Dear Administrator McCarthy:

On December 17, 2009, the Hoosier Environmental Council, the Sierra Club Hoosier Chapter, and the Chicago-based Environmental Law and Policy Center of the Midwest, submitted a petition pursuant to 40 CFR §123.64 to the U.S. Environmental Protection Agency asking the federal agency to correct flaws in the Indiana water pollution control program, which is administered by the Indiana Department of Environmental Management (IDEM). Among the principal problems that we raised in that petition was that Indiana's general NPDES rule for coal mines is not a proper NPDES permit and that Indiana fails to exercise control over coal mining activities required to be regulated under the Clean Water Act, fails to comply with the public participation requirements under the Act, and permits discharges that cause or contribute to violations of state water quality standards and the federal antidegradation policy.

With the sixth anniversary of that petition having passed last year, the failure of Indiana to regulate dischargers from coal mining operations has still not been addressed and we still have not received an answer from the U.S. E.P.A. Indiana's flawed general permit program allows coal mines to discharge pollutants into streams and lakes without the proper controls that should be required with individual permits. Since our groups sent the petition, IDEM has authorized at least 116 new or modified discharges from coal mines under Rule 7. By the state's own assessment, Indiana has as many as 182 miles of streams and 105 acres of lakes polluted by coal mines. The Bear Run mine in Sullivan County, which is touted by Peabody Coal as the largest surface mine east of the Mississippi River, has now been discharging into impaired waters under the defective general permit rule for years, without proper monitoring, without any public information available on many pollutants that may have been discharged from the mine and without the opportunity for the public to comment on a new or revised discharge as would be required with an individual permit.

Moreover, a recent decision in Indiana state court makes clear that there is no reason to believe that Indiana's illegal handling of NPDES permitting for coal mining operations will be corrected without federal intervention. In that case, IDEM allowed new and increased discharges from the Bear Run Mine without an antidegradation analysis and without ensuring that the discharges would not cause or contribute to violations of water quality standards in streams that are already impaired for pollutants discharged by coal mines. The issue was reviewed by the Indiana Office

of Environmental Adjudication, then on appeal at the Marion County Superior Court. The court held that IDEM could hide behind a presumption, wrought out of what is meant to be permit shield language, that anything authorized to discharge under the defective general permit-by-rule necessarily complies with Clean Water Act requirements. The decision both purports to insulate IDEM from its responsibility to require or review any site-specific evidence related to coal mine discharges and renders it all but impossible for citizen groups to obtain the kind of site-specific evidence the court requires to challenge a discharge that, on its face, violates Clean Water Act requirements. The Court rejects federal case law that has required site-specific antidegradation review for discharges authorized under a general permit, stating, "Even if Congress or the EPA enacts new requirements for site-specific antidegradation reviews of discharges under general permits, no such requirements existed at the time IDEM approved the Modifications." (Bear Run Decision, attached in emailed letter, at 24-26.) As justification for its holdings, the court cites to a state statute that mandates that a general permit be available for coal mine discharges, and the fact that USEPA has not objected to the discharge or the program.

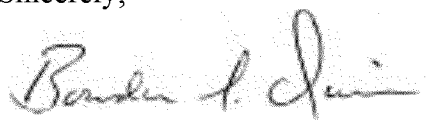
EPA has a legal obligation to grant or deny the Petition. The Administrative Procedure Act (APA) requires that the Agency "conclude a matter" presented to it "within a reasonable time." 5 U.S.C. 555(b). Moreover, the APA provides for a judicial review and authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). The obligation of federal agencies to respond to rulemaking petitions and the reviewability of the reasonableness of agencies' failure to timely act are well-established in case law. See, *e.g.*, Telecommunications Research and Action Center v. FCC, 750 F.3d 70, 70 (D.C. Cir. 1984); In re Am. Rivers & Idaho Rivers United, 372 F.3d 413, 418-19 (D.C. Cir. 2004); Families for Freedom v. Napolitano, 628 F.Supp.2d 535, 540 (S.D.N.Y. 2009); Muwekma Tribe v. Babbitt, 133 F.Supp.2d 30, 33-34 (D.D.C. 2000).

Further delay in responding to the Petition is not warranted and would violate the APA. The EPA has had six years to take action on the Petition. While there is no set rule for when the failure to respond becomes actionable, the D.C. Circuit has said "a reasonable time for agency action is typically counted in weeks or months, not years." In re Am. Rivers & Idaho Rivers United, 372 F.3d at 419. In a recent case filed only one year after the plaintiffs had petitioned for rulemaking, the federal district court concluded, as a matter of law, that the delay was unreasonable and ordered a final decision within thirty days. Families for Freedom, 628 F.Supp.2d at 540.

Conclusion

The Indiana Department of Environmental Management continues to treat massive coal mining operations as though they had no potential for harming water quality. U.S. E.P.A clearly has a duty under the Administrative Procedure Act and the Clean Water Act to take action to correct the situation. If the Hoosier Environmental Council, Sierra Club and the Environmental Law and Policy Center cannot receive relief from a situation that is causing irreparable injury to Indiana waters shortly, it will be necessary for those organizations to protect their members' interest in protecting the rivers, lakes and streams of Indiana and downstream states.

Sincerely,



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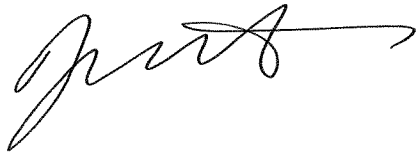

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cc: Robert A. Kaplan, Acting Regional Administrator, U.S. E.P.A Region 5
Carol Comer, Commissioner, Indiana Department of Environmental Management